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May 19, 2008

## ***CERTIFIED MAIL – RETURN RECEIPT REQUESTED***

Lisa Correia, Agricultural Commissioner  
Sonoma County Agricultural Commission  
133 Aviation Boulevard, Suite 110  
Santa Rosa, CA 95403

Michael A. Stoltzfus, President and CEO  
Dynamic Aviation  
Post Office Box 7  
1402 Airport Road  
Bridgewater, VA 22812-0007

A.G. Kawamura, Secretary  
California Dept. of Food and Agriculture  
1220 N. Street  
Sacramento, CA 95814-5607

Mike Kerns, Chairman  
Sonoma County Board of Supervisors  
Sonoma County Administration Building  
575 Administration Drive, Room 100A  
Santa Rosa, CA 95403-2887

Ed Schafer, Secretary  
United States Dept. of Agriculture  
1400 Independence Avenue, S.W.  
Washington, DC 20250

Mary-Ann Warmerdam, Director  
California Dept. of Pesticide Regulation  
100 I Street  
P.O. Box 4015  
Sacramento, CA 95812-4015

### **Re: Notice of Violations and Intent to File Suit Under the Clean Water Act**

Ladies and Gentlemen:

Section 505(b) of the Federal Water Pollution Control Act also known as the Clean Water Act (hereafter, "CWA") requires that 60 days prior to the initiation of a civil action under 33 U.S.C. §1365(a), CWA §505(a), a citizen must give notice of intent to sue to the alleged violator, the U.S. Environmental Protection Agency, the State in which the violations occur and the registered agent of the alleged violator.

Northern California River Watch (hereafter, "River Watch") hereby places all addressees above (hereafter collectively, "Responsible Parties") on notice that following the expiration of 60 days from the date of this Notice of Violations, River Watch intends to bring suit in federal District Court against Responsible Parties by reason of their continuing violations of 33 U.S.C. § 133(a), CWA § 301 and violation of the National Pollution Discharge Elimination System ("NPDES") General Permit CAG990003, Water Quality Order No. 2001-12-DWQ (hereafter, "Aquatic Pesticide General Permit") as exemplified by the incidents of non-compliance set forth below.

River Watch also places Responsible Parties on notice that following the expiration of 60 days from the date of this Notice of Violations, River Watch intends to bring suit against Responsible Parties in federal District Court by reason of their continuing violations of "an effluent standard or limitation," permit, condition or requirement and/or "an order issued by the Administrator or a State with respect to such standard or limitation" under CWA §505(a)(1), 33 U.S.C. § 1365(a)(1), the Code of Federal Regulations, and the Regional Water Quality Control Board Basin Plan, as exemplified by Responsible Parties' illegal discharging into waters of the United States without a NPDES permit for point source as opposed to non-point source discharges.

All laws pertaining to the use of pesticides which come into contact with water must be fully implemented in order to protect human health and the environment. The CWA requires that any discharge of a pollutant from a point source to a water of the United States be regulated by a NPDES permit.

Responsible Parties do discharge and are proposing to discharge the pollutants described below to waters of the United States for the purpose of controlling the Light Brown Apple Moth (*Epiphyas postvittana*). Water bodies sensitive to the Light Brown Apple Moth in Sonoma County include but are not limited to Felder Creek, the Russian River, the Laguna de Santa Rosa and their tributaries and wetlands. Also affected is Carriger Creek which originates on the eastern slope of Sonoma Mountain. In Sonoma Valley, Carriger Creek joins with Felder Creek and becomes Fowler Creek. Fowler Creek joins Rodgers Creek on its way to Sonoma Creek. The waters of Sonoma Creek reach the Napa Sonoma Marsh and San Pablo Bay.

Pesticides intending to kill or otherwise disable the Light Brown Apple Moth are sprayed from airplanes or helicopters. Waters affected include all navigable waters or waters that are hydrologically or biologically connected to the affected surface waters, and all waters that receive drift from such spraying activities, or that lie beneath the spraying activities. Therefore, all water bodies in Sonoma, Napa, Marin, San Francisco, Contra Costa, San Mateo, Alameda, Monterey, Santa Cruz, San Luis Obispo, San Benito, Los Angeles, Santa Clara, San Mateo, and Solano Counties will be affected. (CDFA May 9, 2008 Situation Report).

## **I. BACKGROUND**

In September of 2007, the County of Santa Cruz was subjected to aerial spraying of pesticides in response to a perceived threat of the Light Brown Apple Moth. Acetate-based lepidopteran pheromones - a straight chain lepidopteran pheromone, is the active ingredient in both Checkmate labels proposed for use in the Light Brown Apple Moth eradication program. On September 9, 2007,

the area from Marina and Seaside southward to and including most of the Monterey Peninsula was aerially treated with microencapsulated pheromone for 4 nights in a row ending in the early morning hours of September 13, 2007. Dynamic Aviation of Virginia provided the planes, pilots, and spraying equipment. Since that time a plan has been crafted to pursue an eradication program which includes much more aerial spraying.

The California Department of Food and Agriculture passed a regulation stating that eradication methods include (1) The repeated application of insecticides or herbicides sprays or dusts or biological agents or pheromones (Title 3, Division 4, Chapter 3, adopt, Section 3591.20 to read: Section 3591.20 Light Brown Apple Moth Eradication Area).

The Monterey Bay National Marine Sanctuary is adjacent to the proposed treatment area in Monterey County. This is a federally-protected marine area offshore California's central coast. Stretching from Marin County to Cambria, it encompasses a shoreline length of 276 miles and 5,322 square miles of ocean. This area supports a diverse marine ecosystem and is home to numerous mammals, seabirds, fish, invertebrates, and plants. It is a very productive coastal resource which has been protected for research, education, and public use. Death of seabirds and harmful algal blooms have been associated with the spraying of pheromones which has already occurred.

## II. THE SPRAYING PROGRAM

According to the recommendations of the task force assembled by the U.S. Dept. of Agriculture and California Dept. of Food and Agriculture,

“[a]t this time, aerial application of mating disruption formulations remains the tool of choice for application across broad areas. Substantial development efforts would be needed before other control methods such as sterile insects or biological controls would be ready for program use. In addition, uses of biological control for eradication may be limited.”

Although the treatment of the purported threat of the Light Brown Apple Moth is largely predicated on the treatment of methods used in New Zealand and Australia, the U.S. Dept. of Agriculture's Technical Working Group states,

“[w]e find aspects of the report's analysis of LBAM management in New Zealand to be unfounded and its assumption that the pest's behavior and impact in California can be determined based upon the New Zealand and Australia experience to be scientifically unjustified.”

The pesticide application is to occur by the use of planes flying between 500 and 800 feet above ground and could last three years (April 2, 2007 *Marin Independent Journal*). In addition to Monterey County, Santa Cruz, Marin, parts of San Francisco, Contra Costa, Alameda and San Mateo Counties are scheduled for spraying this summer. It would be the largest such aerial assault in the nation.“ (Supra, *Marin Independent Journal*).

Climate change experts predict the incidence of so-called pests migrating north will increase, which will serve to increase the potential of harmful pesticide exposures to the public and water resources upon which the public relies. Most pesticides have not been subjected to long-term studies on humans and the results have been tragic. History has demonstrated that reports generated or underwritten by chemical companies do not protect water resources or public health. Permits are one means by which pesticide exposure and risks can be substantially controlled.

### **III. VIOLATIONS**

The CWA regulates the discharge of pollutants into navigable waters. CWA §301 prohibits the discharge of any pollutant by any person unless it is compliance with the law. The statute is structured in such a way that all discharges of pollutants are prohibited unless authorized specifically by statute. One such exception authorizes a polluter which has been issued a NPDES permit, to discharge designated pollutants at certain levels subject to certain conditions. The effluent discharge standards or limitations specified in a NPDES permit define the scope of the authorized exception to the 33 U.S.C. § 1311(a) prohibition, such that violation of a permit limit places a polluter in violation of 33 U.S.C. § 1311(a). Paragraph 9 of the Aquatic Pesticide General Permit - Water Quality Order No. 2001-12-DWQ, defines pollutants as residues of pesticides that are left in waters of the United States following application. Checkmate brand pesticides are believed to remain in the water from 2 to 48 hours.

The CWA provides that, in any given state or region, authority to administer the NPDES permitting system can be delegated by the federal Environmental Protection Agency to a state or to a regional regulatory agency, provided that the applicable state or regional regulatory scheme under which the local agency operates satisfies certain criteria. 33 U.S.C. §1342(b). Private parties may bring citizens' suits pursuant to 33 U.S.C. § 1365 to enforce effluent standards or limitations, which are defined as including violations of 33 U.S.C. § 1311(a), 33 U.S.C. § 1365(f)(1).

#### **A. Violation of CWA §301 and CWA §402**

Responsible Parties failed to obtain a point source NPDES permit for their discharges of pollutants from a point source to waters of the United States. CWA §301 and CWA §402 prohibit the discharge of any pollutant from a point source to waters of the United States without a NPDES permit. 33 U.S.C § 1362(6) defines the term "pollutant" to mean "dredged spoil, solid waste . . . chemical wastes, biological materials . . . rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." The equipment used and authorized for use by Responsible Parties to distribute aerial pesticides are point sources under the CWA. Responsible Parties have no NPDES permit allowing them to discharge from a point source to waters of the United States and are therefore in violation of the CWA for each day they so discharge.

Responsible Parties' discharges to waters of the United States are in violation of the point source discharge requirements mandated by CWA §402 such as specific effluent limits, monitoring requirements, and reporting requirements. Due to the occurrence of numerous lakes, streams, drinking water reservoirs, and marine environments, Responsible Parties' activities as set forth in

this Notice of Violations necessarily discharge, and threaten to discharge, directly and indirectly to surface waters.

#### **B. Failure to Obtain an Aquatic Pesticide General Permit**

The action of spraying pollutants directly and indirectly into waters of the United States requires the discharger of said pollutants to obtain a NPDES permit. Responsible Parties have not obtained a NPDES permit to engage in such spraying activities.

According to Paragraph 9 of the Aquatic Pesticide General Permit, pesticides "shall include any substance or mixture of substances intended to be used for eradicating or defoliating plants, regulating an organism's growth, or for preventing, destroying, or repelling or mitigating any pest ...". Checkmate brand chemicals are pesticides. The directions for use of the Checkmate pesticide chemicals caution that they are potentially harmful if swallowed, absorbed through skin, or inhaled. Handlers of the product are warned to avoid breathing vapor or spray mist and to wash thoroughly with soap and water after handling.

Program proponents state the pheromones will not be applied directly to open water per label instructions. Labels on pesticides, however provide no method for analyzing the local impact nor do they regulate the discharge from a particular point source. In addition, pheromones are not designed or intended to be used in aquatic environments such as surface waters. Drift and indirect contact with water occurs. Proponents of the pesticide and the spraying program admit that exposure through drinking water sources is expected to be minimal. As stated previously, Checkmate brand pesticides are believed to remain in the water from 2 to 48 hours.

From September of 2007 through the present, Responsible Parties have violated the CWA, the Regional Water Quality Control Board Basin Plan and the Code of Federal Regulations due to their discharge of pollutants to waters of the United States in violation of NPDES permit requirements including failure to file a monitoring plan, and failure to monitor and report discharges of pollutants to navigable waters. Each and every time Responsible Parties discharge pollutants such as Checkmate brand chemicals into waters of the United States they are in violation of the NPDES permit requirements. Said violations are evidenced by the records kept by Responsible Parties concerning their eradication operations.

Pursuant to CWA §309(d), 33 U.S.C. §1319(d), each of the above described violations subjects the violator to a penalty of up to \$27,500.00 per day per violation for violations occurring within 5 years prior to the initiation of a citizen enforcement action. In addition to civil penalties, River Watch will seek injunctive relief preventing further violations of the CWA pursuant to CWA §505(a) and CWA §505(d), 33 U.S.C. §1365(a) & (d), and such other relief as is permitted by law. Lastly, CWA §505(d), 33 U.S.C. §1365(d), permits prevailing parties to recover costs and fees.

#### **IV. IDENTIFICATION OF NORTHERN CALIFORNIA RIVER WATCH**

Northern California River Watch is a non-profit corporation dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams and

groundwater in Northern California. River Watch is organized under the laws of the State of California and is located at 6741 Sebastopol Avenue, Suite 140, Sebastopol, CA 95472. Telephone: 707-824-4372. It has a website at [www.northerncaliforniariverwatch.org](http://www.northerncaliforniariverwatch.org).

The violations of Responsible Parties as set forth in this Notice of Violations effect the health and enjoyment of members of River Watch who reside and recreate in the affected watershed areas identified above. Said members use the watersheds for domestic water supply, agricultural water supply, recreation, sports, fishing, swimming, hiking, photography, nature walks and the like. Their health, use and enjoyment of this natural resources are specifically impaired by the violations of the CWA identified in this Notice of Violations.

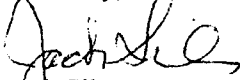
#### V. CONTACT INFORMATION

River Watch has retained legal counsel to represent them with regard to all matters and issues set forth in this Notice of Violations. All communications should be addressed to:

Jack Silver, Esquire  
Law Office of Jack Silver  
P.O. Box 5469  
Santa Rosa, CA 95402-5469  
Tel. 707-528-8175 Fax. 707-528-8675

River Watch believes this Notice of Violations sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch intends to file a citizen's suit against Responsible Parties for the violations set forth herein. During the 60-day notice period, River Watch is willing to discuss effective remedies; however, if Responsible Parties wish to pursue such discussions in the absence of litigation, it is suggested those discussions be initiated promptly so that they may be completed before the end of the 60-day notice period.

Sincerely,

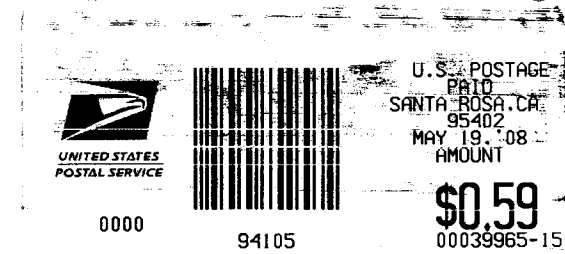
  
Jack Silver  
JS:la

cc: Stephen L. Johnson, Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

✓ cc: Wayne Nastri, Regional Administrator  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne St.  
San Francisco, CA 94105

cc: Dorothy R. Rice, Executive Director  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812-0100

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